EMPLOYMENT TRIBUNALS

Claimant: **Mr C Orogbu**

Respondent: **Duncan Lewis Solicitors Limited**

Heard at: **East London Hearing Centre (via CVP)**

On: **10 March 2022**

Before: **Employment Judge Burgher**

Appearances
For the Claimant: **Ms N Ling (Counsel)**
For the Respondent: **Mr C McDevitt (Counsel)**

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by telephone conference call and then CVP

RECONSIDERATION OF DEFAULT JUDGMENT

1 It is in the interests of justice to reconsider the Default Judgment that was sent to the parties on 16 November 2021. The Default Judgment is revoked.

2 The Respondent is ordered to pay the Claimant the sum of £6500 including VAT as a contribution towards his legal costs arising from the application to reconsider the Default Judgment.

3 Case management orders will be sent to the parties separately regarding the future progression of the case.

REASONS

Issues

1. At the outset of the hearing it was explained to the parties that due to limited judicial time the issue for consideration would be the Respondent's application, made on 28 November 2021, to reconsider the default judgment that was sent to the parties

on 16 November 2021. The Claimant had attended prepared to address remedy but this would now take place on another date if the default judgment is not revoked.

2. Separately, on 24 January 2022, the Claimant made an application for costs. A schedule totalling £10,605.60 including VAT was produced with an accompanying breakdown of hours and rates worked. Ms Ling referred to British School of Motoring v Fowler UKEAT/0059/06/ZT at paragraphs 14 – 16. In that case it was held that under the EAT rules where, as a result of the Respondent's default, the Claimant has been put to the cost of responding to the appeal brought by the Respondent, the Respondent was liable for those costs. However, I keep in focus that my discretionary power to award costs is provided for by rule 76 of the ET rules.

3. In any event, Mr McDevitt, on behalf of the Respondent, accepted that the Claimant's reasonable costs associated with the application for revocation of the default judgment would be properly payable.

Evidence

4. The Respondent called David Head, Director in the Respondent's Risk and Compliance Department and Jason Bruce Practice Manager/Senior Director. The Claimant gave evidence on his own behalf.

5. I was also referred to relevant pages in a bundle consisting of 537 pages and a supplementary bundle of documents regarding the Claimant's health and the Respondent's redirection of post.

Facts

6. As far as relevant to the issues I have to decide, the following facts are relevant.

7. The Claimant was employed as a Director of the Respondent solicitors and was dismissed on 12 November 2020. He commenced the early conciliation process with ACAS on 1 February 2021 and received an EC certificate on 15 March 2021.

8. On 12 April 2021 the Claimant attended an internal appeal hearing and indicated to Mr Bruce in that meeting '*that there was a deadline regarding the claim'*. However, by this stage no claim had been presented to the Tribunal by the Claimant.

9. On 13 April 2020 the Respondent moved its offices from Spencer House, Harrow, to Sackville House, Fenchurch Street as it arranged a mail redirect with Royal Mail to manage this.

10. On 14 April 2021 the Claimant presented his ET1. The Tribunal wrote to the Respondent on the 27 April 2021, the Respondent had until 25 May 2021 to respond to the claim. The Respondent has a paperless office system and has systems to ensure that paper documents are converted into digital format. At the time, Mr Head was responsible for opening an administrative file to action Employment Tribunal claims against the company. No ET3 response was submitted.

11. Further correspondence was sent to the parties from the Tribunal on2 August 2021 when the Claimant's application for a default judgment was refused by Employment Judge Crosfill concluded that it was not appropriate to issue a default judgment because the claim raises important questions and it is appropriate for the Tribunal to hear from the Claimant and see any relevant documents before making the findings sought. A Preliminary Hearing listed for 15 November 2021 will remain listed for Case Management purposes.

12. On 11 October 2021 the documents were reserved on the Respondent's new registered address.

13. The preliminary hearing took place on 15 November 2021, the Respondent did not attend. Default judgment was issued and sent to the parties on 16 November 2021.

14. On 28 November 2021 the Respondent applied to extend time and set aside default judgment. Following further investigation and search undertaken on 2 March 2022 the Respondent accepts that that the Employment Tribunal letters dated 27 April 2021 and 2 August 2021 were received and forwarded to Mr Head by email in accordance with the procedures. It further accepts that the document dated 16 November 2021 was allocated to Mr Head by email. Mr Head and Mr Bruce frankly concede that there has been a breakdown in the Respondent's internal communication process which was exacerbated by the personal and professional commitments of Mr Bruce that resulted in the Tribunal correspondence not being actioned. It has updated its systems to ensure that mail is now sent digitally to at least two Directors.

15. By letter dated 24 January 2022 the Claimant objected to the application and applied for costs.

16. The Claimant's health has slowly improved and was improving further following the default judgment in the knowledge that he would not have to relive the stressful matters that occurred. He states, and I accept, that the further delay in having his case progressed is prejudicial to him in affecting his health.

Law

17. Rule 20 of the ET rules provides:

> *"(1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.*
> *…*
> *(4) If the decision is to refuse an extension, any prior rejection of the response shall stand. If the decision is to allow an extension, any judgment issued under rule 21 shall be set aside.*

18. Rule 70 provides:

"A tribunal may, … on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked, it may be taken again."

19. Rule 71 provides:

"Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary".

20. In the case of Grant v Asda UKEAT/0231/16/BA Simler J President stated at paragraph 18 that:

The approach set out by Mummery J was subsequently adopted in relation to the 2004 Rules in Pendragon plc (t/a CD Bramall Bradford) v Copus [2005] ICR 1671 EAT. In our judgment, it applies with equal force to the 2013 Rules. So, in exercising this discretion, tribunals must take account of all relevant factors, including the explanation or lack of explanation for the delay in presenting a response to the claim, the merits of the respondent's defence, the balance of prejudice each party would suffer should an extension be granted or refused, and must then reach a conclusion that is objectively justified on the grounds of reason and justice and, we add, that is consistent with the overriding objective set out in Rule 2 of the ET Rules.

21. In the case of Thornton v Jones UKEAT/0068/11 consideration was given to whether there was a procedural abuse or intentional default. Underhill J stated at paragraph 18 that if the delay is the result of a genuine misunderstanding or an accidental or understandable oversight, the Tribunal may be much more willing to allow the late lodging of a response.

22. I was referred to the case of Kwik Save Stores Ltd v Swain [1997] ICR 29 which sets out the above principles.

23. Therefore, when considering the 'interests of justice' for reconsideration of the Default Judgment under rule 71 I also consider the balance of prejudice each party would suffer should an extension be granted or refused.

Submissions and conclusions

24. Ms Ling clearly and emphatically submitted that:

24.1 the Respondent has simply not provided a satisfactory explanation for the default, this was not accidental oversight but a series of avoidable and negligent failures;

24.2 the Respondent has not provided sufficient disclosure to evidence the default;

24.3 the merits of the Claimant's claim were strong and that aspects of the Respondent's response had little or no reasonable prospect of success as pleaded;

24.4 the balance of prejudice favours the Claimant, there has been significant delay already, the Claimant has incurred costs in responding and the Claimant's health recovery could be set back if the default judgment is lifted;

24.5 there was limited reputational damage to the Respondent in that there was already a publicly available default judgment against them; and

24.6 the Respondent is able to advance arguments to limit remedy.

25. Mr McDevitt forcefully submitted that that the balance of prejudice favoured the Respondent in allowing an extension of time to present its response and setting aside the default judgment. Specifically:

25.1 The Respondent has good prospects of defending the claim;

25.2 Whilst there is no good reason for the late response of ET3, the failures have been explained and do not amount to procedural abuse or intentional default on the Respondent's behalf.

25.3 The Respondent is Gold Standard Investors in People and a default judgment of this nature would undermine its reputation;

25.4 The Claimant's schedule of loss is in excess of £200,000, nearly £300,000 if grossed up;

25.5 The stress of proceedings is a matter that the Claimant would have to manage in any event;

25.6 and Save for delay, the Claimant has limited prejudice as he can still pursue his claim and the Respondent is prepared to pay the Claimant's reasonable costs arising from the application to set aside the default judgment.

26. Having considered the competing submissions and the law, I conclude that the balance of prejudice favours the Respondent to allow an extension of time to present its response. I do so on the basis that the Claimant's reasonable costs incurred in dealing with this application will be paid by the Respondent.

27. I therefore conclude that the Default Judgment should be revoked.

28. As far as costs are concerned, having considered the Claimant's cost schedule and discounting fees in respect of remedy, I exercise my discretion pursuant to rule 76(1)(a) of the Employment Tribunal rules as the Respondent's conduct in the proceedings was unreasonable in the negligent sense, concerning the inaction in responding to claim in time.

29. When considering the amount of costs I conclude that the total sum of £6500 including VAT is appropriate in respect of the Claimant's costs arising from the application to set aside the default judgment. I have discounted costs which incurred in preparing for remedy which would be incurred in any event.

30. The Respondent is therefore ordered to pay the Claimant £6500 in respect of his costs.

Employment Judge Burgher
Dated: 18 March 2022